***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

Original B

# 74-2675

*To be argued by*
EDWARD R. KORMAN

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 74-2675**

UNITED STATES OF AMERICA,
*Appellee,*

*—against—*

FREDDIE HILTON,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF FOR THE APPELLEE


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UNITED STATES OF AMERICA,

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*Defendant-Appellant.*

## BRIEF FOR THE APPELLEE

### Preliminary Statement

The defendant, Freddie Hilton, appeals from a judgment entered on December 23, 1974, by the District Court for the Eastern District of New York (Mishler, *Ch. J.*), which convicted him, after a jury trial, of conspiring with three accomplices, to rob the Jackson Heights Savings and Loan Association, located at 89-01 Northern Boulevard, Queens, New York. The defendant, who was sentenced to a five year term of imprisonment, was acquitted by the jury of participating in the commission of the bank robbery. He is currently incarcerated.

On March 18, 1975, after the brief on appeal was filed by the defendant, the case was remanded to the district court, upon the suggestion of the United States, with directions to "promptly conduct a hearing to resolve the issues before it to determine the consequences of the failure of the government to reveal before cross-examination

the existence of a letter dated February 8, 1974, sent by the government's witness, Avon White, to Assistant United States Attorney Robert Clarey" (A. 17).[1] Such a hearing was held on April 10, 1975, and on May 2, 1975, Chief Judge Mishler filed a Memorandum of Decision, which found that the letter "would have offered nothing of significance to defense counsel for cross-examination purposes" and that "[t]he letter in the hands of skilled defense counsel could not have induced a reasonable doubt in the minds of jurors" (A. 13). Accordingly, Chief Judge Mishler declined to order a new trial. The defendant challenges that determination on this appeal.

## Statement of Facts

### A. The Robbery of the Bank

On the morning of April 10, 1973, the Jackson Heights Savings and Loan Association, located at 89-01 Northern Boulevard, Queens, New York, was robbed of approximately $5,800. A few minutes before the robbery occurred, one Philip Weber, who lived across the street from the bank, observed three blacks walking down the block to the bank. Shortly thereafter, he saw the same three persons hurry into a waiting automobile and drive away fast (A. 284-286). Although he was unable to identify any of the individuals involved in the incident, he did manage to get the license number of the getaway car. Mr. Weber also noticed that one tire on the car was almost flat. Subsequent investi-

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[1] Page references in parenthesis preceded by the letter "A" refer to pages in the Appendix for Appellee. Because the Appendix for Appellant (which contains the indictment, docket entries and the district court's charge) is not consecutively paginated, references to its contents, when necessary, will be made directly to the item. Page references in parenthesis which are not preceded by "A." refer to portions of the trial transcript which have not been included in either appendix.

gation by law enforcement authorities, after the recovery of the vehicle with the flat tire revealed—not surprisingly—that the car was stolen from a Queens College Professor, Robert Edgar, the day before the bank robbery (474).

Professor Edgar testified that at about 1:45 P.M., while in his car in the Queens College parking lot, he was accosted by the defendant Freddie Hilton and another man, who, he testified, "strongly resembled" Avon White (A. 332, 315-317). They forced him into his car, where the defendant Freddie Hilton took the wheel, while Avon White sat in the back seat. After a fifteen minute ride off and on the Long Island Expressway (during which he was seated in the front of the car with Hilton), he was released at 169th Street in Queens (A. 310-313). Prior to being released he was relieved of his wallet, his money and his watch (A. 311).

The details of the events which took place in the period between the theft of Professor Edgar's vehicle, and the robbery of the bank the next day, as well as the circumstances leading up to these events, were filled in by Avon White, who testified at the trial of Freddie Hilton (A. 41-232). The substance of his testimony was that late in March, 1973, Twyman Myers, Phyllis Pollard, and the defendant, Freddie Hilton, planned the robbery of the Jackson Heights Savings and Loan Association (A. 52). These persons, named as co-conspirators, had been living in the same apartment on Marion Avenue in the Bronx (A. 51) and had at times discussed the possibility of robbing a bank. It was not until Twyman Myers suggested the Jackson Heights Savings, located at 89-01 Northern Boulevard, that specific action was taken (A. 52). Pollard and Twyman made a diagram of the bank (A. 53) and in discussions among the co-conspirators all aspects of the robbery were worked out (A. 56). Pollard and White would vault the teller's counters, Myers would control the guard, and the defendant Hilton would drive the getaway car (A. 53-55).

The conspirators decided that they had to use a four-door car in the robbery because, in case of an emergency, they could more easily exit from such a car (A. 57). On April 9, 1973, White and the defendant Hilton went to the Queens College campus to obtain such a vehicle. Both White and Hilton were armed. According to White, Hilton was carrying a 9 millimeter Browning with the serial number scratched off (A. 59). They arrived at the parking lot at 1:00 P.M. and waited for someone to drive in with a suitable automobile. At 1:45 P.M., they commandeered a light blue four door Chevy and drove off with the owner (Professor Edgar) (A. 337-339).

Soon after this, White and Hilton let Edgar off at 169th Street near an exit of the Long Island Expressway (A. 64). Then the two men drove to the bank and took a "dry run" of the escape route (A. 65). They drove from the bank to Grand Central Parkway, to the Triboro Bridge, and into the Bronx (A. 67). They figured their escape time, from the bank to toll booth on the Triboro Bridge, to be eight minutes (A. 68).

The next morning White, Pollard in the back seat, Myers in the front righthand seat (A. 73), and the defendant Hilton at the wheel of the stolen car drove to the bank. The defendant Hilton dropped the others off at 89th Street off of Northern Boulevard (A. 74). The three walked around the corner and into the bank at approximately 11:00 A.M. (A. 75). As had been planned White and Pollard vaulted the counters to collect the money, and Myers restrained the guard at the door (A. 75). The robbers then exited the bank with the money, walked hurriedly around the corner to 89th Street, jumped into the car, and drove away (A. 76).

Once on the Grand Central Parkway, they noticed that the right rear tire was flat (A. 77). They, therefore, exited from the parkway and drove into the parking lot of a diner. From there they all took the subway to 126th Street and

Lexington Avenue where they split up; the defendant Freddie Hilton and Avon White, and Phyllis Pollard and Twyman Myers took separate taxis back to the Bronx (A. 76-77).

Freddie Hilton was arrested in the early morning of June 7, 1973, outside 440 New Lots Avenue in Brooklyn. At the time of his arrest, Hilton was in possession of the 9 Millimeter Browning with the serial number scratched off, which White testified Hilton carried during the theft of Professor Edgar's car.

## B. The Defense

The defendant Hilton did not take the stand nor did he put in a defense. Defense counsel conceded, during his summation, that Avon White testified truthfully about his own participation in the bank robbery (A. 374); and about his and Mr. Hilton's participation in the theft of the getaway car (A. 366). The defense to the indictment essentially was that Avon White lied only in implicating the defendant Hilton in the bank robbery and the conspiracy to commit the offense. Since that "defense" turned almost exclusively on the examination and cross-examination of Avon White, we turn now to that aspect of the case.

## C. The Examination of Avon White

Avon White, the friend and accomplice of the defendant, Freddie Hilton, had an extensive criminal background, which he detailed on direct examination, and which ranged from the commission of minor offenses to bank robbery, assault and murder (A. 41-45). At the time of the trial, Avon White had admitted to complicity in three other bank robberies, in addition to the one about which he testified here (A. 41-42). Pursuant to a plea bargain in which he had entered, White pleaded guilty to one count of armed bank robbery—in satisfaction of all four robberies in which he admittedly participated (A. 43). Accordingly, at the time

he testified, he was awaiting sentence on that offense, a sentence which he knew could be as much as twenty-five years in prison (A. 43, 81-82).

Moreover, Avon White had also pleaded guilty in the New York State Supreme Court (Bronx County) to a charge of attempted murder of a police officer; this Class B felony (also carrying a maximum penalty of thirty years in prison) was in satisfaction of two attempted murder charges (A. 43-44). Although he had not been sentenced on this plea, Avon White testified that he had been assured that his present cooperation would be made known to each of the sentencing judges (A. 44). Mr. White testified further that, in return for his truthful testimony, a specific recommendation would be made to the sentencing judge that he receive a concurrent sentence to be served in a federal correctional institution (A. 50).

This, however, was not the least of Mr. White's past and present difficulties. First, he still faced additional armed robbery charges in both Kings County and Queens County, which had not been disposed of (A. 44). Moreover, Mr. White testified to his prior convictions which included one juvenile offense, one youthful offender conviction for beating a police officer, a concealed weapon charge in North Carolina, and a parole revocation growing out of a marijuana possession charge (A. 45-47).

There was, however, still more in Mr. White's history and conduct which defense counsel elicited during cross-examination in a most effective way in order to discredit Mr. White's testimony. Indeed, defense counsel was given free reign by Chief Judge Mishler, who announced almost at the outset of the cross-examination, that he would allow "extraordinary limits to cross-examination" (A. 92) and that he would give counsel "every opportunity to prove the witness was incapable of telling the truth."

The Chief Judge kept his promise. Thus, he permitted defense counsel to range far and wide, not only with regard to Mr. White's plea bargain which was disclosed on direct examination, but with regard to Mr. White's prior history of mental illness, as well as acts which tended to discredit Mr. White's testimony.

At the outset, Mr. White admitted that at the time of trial he was taking Valium three times a day (A. 82):

> Q. Are you using drugs or medication now? A. Am I using any drugs?
>
> Q. I don't mean illicit drugs like heroin, any kind of depressant prescribed by a doctor to calm you down? A. Yes.
>
> Q. What are you using? A. Valium.
>
> Q. Vitamins? A. Valium.
>
> Q. When was the last time you had Valiums? A. Yesterday.
>
> Q. How often do you use Valiums? A. For about the last—last maybe week I was getting them for three times a day.
>
> * * * * *
>
> Q. Is there anything troubling you? A. Troubling me?
>
> Q. Yes. A. Sure.
>
> Q. Is that the possible 20 year sentence hanging over your head? A. Possible 25, and more too.
>
> Q. Starting with the 25 years with Judge Gagliardi? A. Yes.
>
> Q. And the 8 to 30 from Judge Dollinger in the Bronx?

After exploring this line of questioning at length, defense counsel was also permitted to go into detail regarding the circumstances under which other offenses had been committed (A. 95-97); these included the pistol whipping of a bank manager (A. 95), and the beating of a police officer

(A. 87). Defense was also permitted to show that after one of Mr. White's early convictions, he was sentenced to a State prison facility (Comstock) where he was very unhappy and faked insanity in an effort to get out (A. 110):

> Q. You wanted to get out of Comstock and go someplace else? A. Yes.
>
> Q. And in answer to a question by Mr. Clarey, you said you faked insanity; right? A. Yes.
>
> Q. How did you do that? A. How did I do that?
>
> * * * * *
>
> Q. Yes. What did you do? A. I went to see the institution psychiatrist and I told him I was God.
>
> Q. You told him you were God? A. Yes.
>
> Q. Did you tell him that about a month before you saw him you were thinking of killing people, killing inmates in there, who were trying to take your manhood away from you? A. Yes, I did.
>
> * * * * *
>
> Q. So up to now everything you said to them wasn't an act, you believed everything you told them, you weren't trying to fool them? You weren't faking insanity? A. I was faking.
>
> Q. When you say faking, do you understand faking to mean not telling the truth? A. Right.

Mr. White responded to additional questions in a similar way (A. 117-118):

> Q. Did you tell the doctor that you had been watching him and you were the all-seeing eye, did you tell that to him? A. Yes.
>
> Q. Did you believe that to be true at the time you said it to him? A. No.
>
> Q. That was a lie? That was a fake, right? A. Right.
>
> Q. Did you tell him you were the Lord and the savior of the world and you were the almighty God

> Allah, the supreme being; did you say that to the doctors at Comstock? A. Yes.
>
> Q. Did you believe that to be true at the time you said it? A. No.
>
> Q. That was a lie, right? A. Yes.
>
> Q. Did you tell them that you were always the savior, saving the world and that you would always be here, you will never die; did you tell them that? A. Yes.
>
> Q. Did you believe that to be true or was this a lie? A. A lie.

Having taken advantage of Mr. White's admission that he lied to get out of Comstock and into Matteawan State Hospital, he then attempted during his interrogation to suggest that in fact Mr. White was mentally ill (A. 137) as defense counsel told Chief Judge Mishler "[t]his man is either crazy or a liar" (A. 128). Accordingly, he was permitted to offer into evidence a number of records regarding Mr. White's mental condition during the period when Mr. White was at Comstock and Matteawan in 1968. These documents included evaluations by Mr. White's psychiatrists to the effect that Mr. White "was mentally ill" (A. 142-143); and an order of a New York State Judge finding Mr. White to be "mentally ill" and committing him to an institution for "the treatment of mental diseases" (A. 143).[2] Moreover, although Chief Judge Mishler de-

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[2] In admitting this evidence, without any testimony as to whether mental illness, of the kind which Mr. White allegedly suffered, affected his ability six years later to testify truthfully, Chief Judge Mishler stated (A. 132):

> "It may have something to do with the ability of the witness to tell the truth. I think it is far-fetched, but, as I said, I am giving the defendant wide latitude. Normally, I would say he should bring in expert testimony on the issue, but the defendant prefers to do it this way. I do not want him to claim that he was not given every opportunity to prove that the witness was incapable of telling the truth.

clined to admit in evidence—without expert testimony explaining its significance—a document characterizing Avon White's illness as "psychopathic personality paranoid and reactive features" (A. 137-138), that diagnosis in fact came before the jury when the Assistant United States Attorney was permitted to introduce a document stating that White had recovered from that specific psychotic episode (A. 225).

After this line of questioning, defense counsel then returned to prior instances in which White had lied. He established that Avon White had used an alias in order to obtain reduced bail after some of his earlier arrests (A. 147):

> Q. Did you lie when you gave false names so that your bail would be reduced or you would get a low bail and wouldn't have to sit in jail? Did you do that? A. Yes, sir.

Defense counsel also established that when Avon White initially related the events leading up to the robbery at issue, he lied to the F.B.I. in order to protect Phyllis Pollard, and told them that the woman who participated in the robbery was someone named Margaret (A. 206). Moreover, he also failed to advise the F.B.I. of the full extent of his participation in these bank robberies (A. 168-169). Finally, defense counsel, with the assistance of Chief Judge Mishler, established that Mr. White believed that "the prosecutor would be more helpful to [him] if [he] said Fred Hilton was the driver [of the getaway car] than if [he] said [he] was not the driver" (A. 186).

This summary of the cross-examination only highlights a searing cross-examination of White, which apparently discredited his testimony almost completely. The jury convicted the defendant Freddie Hilton of conspiring to rob the Jackson Heights Savings and Loan Association, but it acquitted him of actually participating in the rob-

bery by driving the getaway car. The jury had difficulty in believing Mr. White as the appellant correctly observes (Br. 37), and it apparently credited only that part of his testimony which was corroborated by Professor Edgar; that the defendant Hilton, along with Avon White, participated in stealing his car for use the next day as the getaway car. Although they could have convicted the defendant Hilton—as an aider and abettor in the bank robbery on this evidence alone—they apparently believed that this limited form of participation did not justify conviction of a count which they knew, from Mr. White's cross-examination, carried a twenty-five year maximum penalty.

## D. The Evidence Discovered After Trial

1. The Assistant United States Attorney who tried this case left the United States Attorney's Office in January, 1975. Subsequently during the preparation of the brief we learned of a letter in the file from Avon White to Mr. Clarey, which was written on February 8, 1974, some five months prior to the trial. Mr. White, who was then in solitary confinement in Sing Sing, for his own protection, asked for Mr. Clarey's assistance because of the nature of his confinement (administrative segregation). Moreover, he called attention to his prior "cooperation with the government" and stated that "he was ready to go with you this time on the Government. Hilton and I will continue to do so so long as I know that people are trying to help me." Mr. Clarey, upon receiving this letter, did nothing for Mr. White, other than put the letter in the file and forget about it until it was brought to his attention after trial (A. 444-447). Moreover, at the same time Mr. White wrote to Mr. Clarey, he wrote a similar letter to an Assistant United States Attorney in the Southern District of New York (Peter Truebner) who handled the unsuccessful prosecution of Fred Hilton and Joann Chesimard, at which Mr.

White also testified. Mr. Truebner first called John Curley, White's attorney, to inform him of his client's situation (A. 467). He also called Assistant District Attorney John Gelb, who was in charge of state prosecutions in the Bronx, to seek his help in alleviating the oppressive conditions. Although Mr. Truebner wrote Mr. White and told him that he was "actively trying to find a solution" to his problem (A. 506) his efforts resulted in no change in White's situation. As Mr. Truebner explained (A. 468):

> "Mr. Gelb said that Avon White was expected to be a witness in a trial in Bronx County shortly, and it was necessary that he remain at Sing Sing so that he could be called to the courthouse on short notice.
>
> We also discussed the problem of Avon White's own safety, which is a matter I had discussed with Avon on more than one occasion and we agreed that it would be best for him to stay segregated from the general prison population."

Accordingly, for his own protection, as a result of his cooperation with authorities, Mr. White remained in administrative segregation at Sing Sing until February, 1975 (A. 483). Yet defense counsel was able to tell the jury in his summary that (A. 378) "they have kept him in jail in slightly better condition than the average prisoner, so they have shown, the Government has shown its good faith. He is here, he has reason to believe they are going to follow through on the deal that they made."

2. On March 18, 1974, upon being advised by the United States of the existence of White's letter, this Court, at the suggestion of the United States Attorney, directed that a hearing be held "promptly" to determine the significance, if any, that the failure to disclose the letter to

defense counsel had upon the trial.[3] The district court, after the remand, suggested in a letter to Mr. Bloom, that the hearing would take place on March 31, 1975. Mr. Bloom responded that he was involved in a trial of a state criminal case (*People* v. *Torres*) which would not be completed for a few weeks. Chief Judge Mishler then rescheduled the hearing, fixing April 18, 1975 as the hearing date and informed Mr. Bloom that, due to a lengthy trial commencing April 14, April 18 was the only day on which he will not be on trial (A. 2-3).

On March 31, 1975, the charges against Mr. Bloom's client, Gabriel Torres, were dismissed. Upon dismissal of these charges, Mr. Bloom announced that he would thereafter appear as co-counsel for defendant Bell, who had been represented by a Mr. Ratner during the four month trial. Mr. Bloom's assumption of these responsibilities

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[3] The record does not reflect the manner in which the existence of the letter was discovered. Since appellant has speculated in his Supplemental Brief (p. 20) that it was discovered by the Assistant United States Attorney who was preparing the brief—who "immediately" recognized its importance—we are setting forth here the correct explanation. On February 20, 1975, the judgment of conviction of one Henry Stuart Brown—whom Mr. Clarey had tried—was affirmed (511 F.2d 920 [C.A. 2]). Mr. Paul B. Bergman, our Chief Appellate Attorney, called Mr. Clarey to tell him of the decision. In the course of the conversation, Mr. Bergman told Mr. Clarey about a letter Avon White wrote to Peter Truebner, as Assistant United States Attorney for the Southern District of New York, which was discovered after the conviction of one Melvin Kearney; the appeal from that conviction was pending before this Court (74-2337). Upon being apprised of the contents of that letter, Mr. Clarey informed Mr. Bergman that he had received a similar letter. Mr. Bergman then directed the Assistant United States Attorney handling the appeal to search the file; after the letter was found, this Court was immediately apprised of its existence (A. 503).

was described by Mr. Justice Greenfield in a letter to Chief Judge Mishler, as follows (A. 23-24):

> "When charges against the defendants Torres were dismissed, Mr. Bloom and Mr. Mogulescu announced that they would thereafter appear for defendants Bell and Bottom respectively. The court pointed out that these defendants already had counsel designated by the Appellate Division who would not be relieved of their responsibility. Messrs. Bloom and Mogulescu then announced that they had been "retained" by defendants Bell and Bottom, and that they would appear as "co-counsel". The Court pointed out that under those circumstances they would be considered volunteers and would not receive any further compensation under Article 18B. The Court further pointed out potential problems with conflicts of interest. The attorneys indicated that all clients had acquiesced in the new arrangement. Thereafter Messrs. Bloom and Mogulescu took over all the questioning and all the summation, leaving previous counsel with little to do.

On April 4, 1975, Mr. Bloom called and asked that the hearing scheduled for Friday, April 18th be rescheduled because his client was a practicing Muslim (A. 3) and could not appear in the district court on a Friday. It was never made clear by Mr. Bloom why it was essential for Mr. Hilton to be present at the post-trial hearing of a collateral issue.[4] (The defendant had waived his right to appear at a trial proceeding when the jury returned its verdict, which took place on a Friday [703].

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[4] F.R. Crim. P., Rule 43, which provides that a defendant shall be present at the arraignment, every stage of the trial, the return of the verdict and the imposition of sentence, is inapplicable to "motions made prior to or after trial." *Advisory Committee Notes*, F.R. Crim. P., Rule 43.

Mr. Bloom then suggested that Thursday, April 10, 1975 would be convenient for him. The district court agreed to this date which was then fixed for the hearing, and Mr. Bloom was so informed on April 4, 1975 (A. 3).

On April 9, 1975, the jury in the *People* v. *Torres* case ended its deliberations for the day without coming to a verdict (A. 23). Mr. Bloom was in his office the next morning waiting for the verdict. He called Chief Judge Mishler's offices at 11:30 A.M. to say that he was still awaiting the return of a jury, and believed it likely that he would be unable to appear. Mr. Bloom was then informed that the hearing could be delayed until 3:00 P.M., but that it would take place that day (A. 3). Mr. Bloom responded he would not appear at all that day (A. 3). The jury in the Torres case returned a verdict at 4:10 P.M. (A. 23).

The district court decided to proceed with the hearing in Mr. Bloom's absence. At the hearing, the district court offered to assign counsel; although defendant rejected this offer, he personally participated in the examination of at least one of the witnesses (A. 486-490). In addition, the district court directed the United States Attorney to supply defense counsel with a copy of the transcript of the hearing and invited the submission of briefs by both sides. Defense counsel failed to submit a brief; he also failed to satisfactorily explain why his presence, along with that of Mr. Bell's assigned counsel, was necessary when the verdict was returned in *People* v. *Torres*.

## E. The Post-Trial Opinion of the District Court

On May 2, 1975, Chief Judge Mishler filed a twenty-two page opinion, containing his findings of fact and conclusions of law, on the issues arising out of the failure of Mr. Clarey to turn the letter of Mr. White over to defense counsel prior to summation. After stating the factual background, Chief Judge Mishler observed that it was

"evident that in relation to the two matters raised in White's letter, *i.e.*, his mental condition and his continued willingness to testify for the government in light of the circumstances of his confinement, defense counsel covered, or had information which enabled him to cover, these topics in his examination of White."[5] Moreover, he noted that Mr. Bloom's cross-examination of Mr. White, which covered 140 pages of transcript, explored Mr. White's psychiatric history (including his feigning of mental illness) in great detail; that it covered his prior record, then pending state and federal criminal charges, prior inconsistent statements, as well as the "bargain" he made for his testimony. Chief Judge Mishler then found that (A. 9-10):

> ". . . Of particular significance here is the fact that the two issues raised by White's letter were fully covered. The mental strain which White mentioned in his letter could have added nothing to the voluminous psychiatric history admitted at trial. Similarly, White's veiled threat concerning his con-

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[5] These materials included (A. 8-9):

(1) "A mass of 3500 material * * *. Bloom represented Hilton in the trial and re-trial in the Southern District. Bloom did not cross-examine White in the first trial in *United States* v. *Chesimard and Hilton*, but cross-examination of White in the second trial covered approximately 110 pages of trial transcript. Bloom had available the cross-examination of White conducted by defense counsel in *United States* v. *Kearney*, (this testimony covered approximately 20 pages)"; and

(2) "A file, including a psychiatric report of White dated July 2, 1968, which was included in a memorandum of decision and order adjudicating White an incompetent (Tr. Exhibit 3, thereafter marked defendant's Exhibit A, B, C, D and F in evidence). The government also turned over to defense counsel a three-page F.B.I. interview report which included White's version of the events leading up to and including the robbery" (Tr. Exhibit 2).

> tinued willingness to testify would have contributed nothing to the issue of White's credibility. First, since no action was taken in response to White's plea, the letter provides no basis for showing that White's testimony could have been affected by his treatment. Secondly, insofar as the letter relates to his general willingness to testify for the government, this issue was covered extensively when White was questioned about the "deal" he had been given for his cooperation. Finally, it should be noted that Bloom brought out the fact that White was being held in administrative segregation in an attempt to show that he was receiving special treatment, not given to ordinary prisoners. Thus, it is clear that had it been produced, the letter would have contributed nothing of benefit to the defendant, and may even have damaged the attempted impeachment of White."

Since Chief Judge Mishler concluded that there was no significant chance that this "added item developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction" (*United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974), he denied the application for a new trial (A. 13).

Turning to the second issue raised by the hearing, Chief Judge Mishler concluded that, in the circumstances of this case, it was proper for him to have proceeded in the absence of Mr. Bloom. This conclusion was premised on two considerations. First, Chief Judge Mishler held that, since the purpose of the hearing was to determine the significance of Mr. White's letter, essentially a legal determination, Mr. Bloom's absence from the hearing, which established the basic "facts relating to the letter and any actions taken in response to it," was not prejudicial. Second, and "more importantly" Chief Judge Mishler concluded that the district court had no obligation to reschedule the hearing for Mr. Bloom's convenience (A. 14-16):

". . . *In blunt terms, the question of whether it was permissible to proceed in Bloom's absence boils down to the question of whether the court is obliged to disrupt its own calendar to accommodate an attorney.* The answer in this instance is that it is not.

As discussed previously, the court rescheduled the hearing twice at Mr. Bloom's request. Further, it was at his suggestion that April 10, 1975, was fixed as the (final) hearing date. When this date was fixed, Mr. Bloom was aware of the court's commitments, which excluded any other possible hearing date prior to late May. Mr. Bloom was also aware of the mandate of the Court of Appeals directing this court to conduct a prompt hearing. Despite these facts, however, Mr. Bloom chose not to appear, and instead, spent his time waiting for a jury verdict in a case which he joined as co-counsel, after this hearing had been directed. Under these circumstances the court must conclude that Mr. Bloom's decision not to appear was unjustified, and that the hearing conducted in his adsence was proper.

The convenience of the court and the government is of equal importance with that of defense counsel. The right to counsel does not require that the court be precluded from the expeditious exercise of its duties in order that defense counsel can select a hearing date which is most convenient for him. *See, United States* v. *Maxey,* 498 F.2d 474, 482-83 (2d Cir. 1974). The court offered to provide defendant with counsel at the hearing, and allowed defendant to examine the witnesses.

Under the circumstances, the court was obliged to do no more. *See, United States* v. *Calabro,* 467 F.2d 973, 988-89 (2d Cir. 1972), *cert. denied sub nom, Conforti* v. *United States,* 410 U.S. 926, 93 S.Ct. 1386 (1973).

# ARGUMENT

## POINT I

### The failure to disclose Avon White's February 8, 1974 letters which would have only been used to further impeach Avon White, whose credibility had been seriously undermined, does not require a new trial.

The principal issue raised by the appellant, to which he has devoted a twenty-five page supplemental brief, turns on the correctness of the finding of Chief Judge Mishler that, in light of all circumstances of the case, the letter of Mr. White "would have offered nothing of significance to defense counsel for cross-examination purposes" and that "[t]he letter in the hands of skilled defense counsel could not have induced a reasonable doubt in the minds of the jurors" (A. 13). The appellant also challenges the propriety of the conduct of the post-trial hearing of this issue after his counsel, Mr. Bloom, deliberately failed to appear and he declined the offer of Chief Judge Mishler to assign counsel for him.

We submit that Chief Judge Mishler correctly found that the two issues raised by White's letter were fully covered at trial; that "the mental strain which White mentioned in his letter would have added nothing to the voluminous psychotic history admitted at trial"; and that "White's veiled threat concerning his continued willingness to testify would have contributed nothing to the issue of White's credibility" (A. 19). Moreover, Chief Judge Mishler was clearly correct in refusing to further delay the hearing on this issue for the benefit of a defense lawyer who, aware of the direction of this Court that a prompt hearing be held, undertook additional commitments to other clients, without regard to its affect on the ability of the district court to comply with the mandate of this

Court, and who, had he been in the least bit concerned, could have in fact appeared for the hearing. We deal with each of these issues separately.

## A. The Failure to Disclose the Letter

We have set forth earlier the extent to which the testimony of Avon White was undermined during his cross-examination, a judgment which was confirmed by the verdict of acquittal on the substantive offense. As the appellant aptly observed in his main brief: "[T]he jury verdict of acquittal on the two more serious substantive offenses shows they had substantial doubts about the government's case, especially the testimony of Avon White" (Br. 37). Indeed, their failure to convict on the substantive offense plainly shows that they credited Mr. White's testimony only to the extent that his testimony, that he and the defendant Hilton stole Professor Edgar's car for use the next day as the getaway car, was corroborated by Professor Edgar's identification. While that evidence was sufficient to justify a conviction of the substantive offense, the jury may have been reluctant to convict of that offense solely on the basis of his limited participation in the conspiracy.

Under these circumstances, what additional use could have been made by defense counsel of a letter written by Avon White, approximately six months prior to trial, asking for assistance in getting released from solitary confinement because it was affecting his mental stability, and suggesting that his testimony was given on the basis of a *quid pro quo*, when in fact the record would also show (1) that nothing was done for Mr. White in response to the letter; (2) that he nevertheless testified at trial, and (3) that he bore the ordeal of administrative segregation largely for his own protection because he was a cooperating witness.[6]

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[6] At one point during the trial appellant lunged at White as he was leaving the court room (A. 127).

Moreover, the letter would have completely eliminated the argument which defense counsel made to the jury that "[n]ow they have kept him in jail in slightly better condition than the average prisoner, so they have shown, the Government has shown its good faith. He is here, he has reason to believe they are going to follow through on the deal that they made" (A. 378).

Understandably, appellant is hard to put to answer these questions without straining the record to the ~~tenti-~~ ~~nicety~~ point of reason. Appellant's argument, like the contents of the letter, is two-pronged.

1. The first part of that argument deals with the following sentence in the letter:

> "I am writing you this letter to see if there is any way possible that you can have me moved from Ossining Correctional Facility to another institution because I am being held in solitary confinement and I am on the verge of having a nervous breakdown."

At the hearing on April 10, 1975, White explained that what he meant by the words "nervous breakdown" was "I was constantly in myself for a period of 23 hours a day. And I couldn't get no kind of privileges or nothing" (A. 488-489). White, therefore, simply wanted to be transferred to a regular prison section where he would no longer be alone and would enjoy the contact of other prisoners for more than one hour a day. Such a transfer would end what he referred to in the letter as solitary confinement.

This portion of the letter, appellant argues, shows (1) that White "was lying at trial when he testified that he was cured of the kind of behavior exhibited by him in 1968-1969, when he faked insanity to his doctors, or actually believed his own fantasies of omnipotence and a moral superiority, in order to gain special treatment from prison

authorities"; (2) that White was treading "that thin line between faked insanity and actual insanity, perhaps not sure himself what was his true state of mind; (3) that "just as the truth about his state of mind in 1974 was suspect, so the truth of what facts came from that state of mind were suspect"; and (4) that the prosecution was employing "[a] technique to insure that White could not balk anywhere along the line, as his letter of February 8 indicated he might, * * * [by having] his experience a good dosage of life in State prison" (Supplemental Br. 13-14). These arguments are without any substance.

First, Mr. White testified at the trial that he was *not* mentally ill between 1966-1968, but that he feigned mental illness in order to get out of a state prison facility where he was being abused sexually. While Mr. White did testify that he no longer held some of the outlandish beliefs he voiced between 1966-1968, the letter did not show that he lied at trial; rather it shows only that prolonged periods of administrative segregation were having what would seem to be a natural effect on him. Moreover, the fact that Mr. White, a layman without formal education, did not use the term "nervous breakdown" in its technical sense, hardly establishes that he was lying to Messrs. Clarey and Truebner. Indeed, if the administrative segregation was not troubling him emotionally, why would White go to the efforts which he did to avoid it.

Second, the testimony of Mr. White at trial provided an ample basis for the questioning of his mental stability. As the appellant observed in his main brief (Br. 12): "White testified that he still believed at the time of trial that he was the giver and taker of life (277). He was [also] getting Valium three times a day". This point was again emphasized in summation when defense counsel argued to the jury: "Why is he using valium now? Is he a healthy person? Three times a day is a lot of valium" (A. 381).

Third, there is no expert testimony that even if Mr. White had recurring attacks of mental illness, or was on the verge of a nervous breakdown in February, 1974, that this would have affected his ability to testify in July, 1974. Moreover, in this regard, it must be remembered that White implicated Hilton in the robbery immediately after his arrest (A. 203-206, 379), and before he was placed in administrative segregation. This evidence clearly rebuts any claim of recent fabrication.

Finally, if defense counsel was deprived of the improbable and baseless argument that keeping Mr. White in solitary confinement was a technique employed by the federal prosecutors to insure his continued cooperation by holding out the incentive of having Mr. White's ultimate sentence served in federal custody,[7] that "prejudice" was now more than offset by his ability to argue to the jury that "[n]ow they have kept him in jail in slightly better condition than the average prisoner, so they have shown, the Government has shown its good faith. He is here, he has reason to believe they are going to follow through on the deal that they made" (A. 378).

Yet, assuming that there is merit to all of these claims, we return to the basic fact that Avon White's testimony was already devastated and that the jury was not willing to convict appellant based on White's testimony alone. Surely, the additional fact that Avon White was in administrative segregation as a result of his cooperation, and desired to be treated as any ordinary prisoner, would hardly have altered their apparent determination that no one should be convicted on the basis of his uncorroborated testimony.

2. The second part of appellant's argument on the significance of the letter involves that part of the letter in

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[7] In fact, as appellant has noted, Mr. Truebner did undertake efforts—albeit fruitless—to aid Mr. White.

which Mr. White indicated, in substance, that his continued cooperation in this case was contingent on the "knowledge" that people are trying to help me".

This letter no doubt shows, as appellant alleges, that White was testifying "purely for the *quid pro quo*" (Supp. Br. 17); but White already admitted that much at trial, and no one ever tried to hide from the jury what that *quid pro quo* was. Moreover, Avon White admitted further, in response to an inquiry from Chief Judge Mishler, after defense counsel was unable to properly frame the question, that he was aware that the prosecutor would be "more helpful to [him] if he said Fred Hilton was the driver [of the getaway car] than if [he] said he was not the driver" (Tr. 345).[*] Of course, in his summation, defense counsel was able to effectively drive home the point (Tr. 599):

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[*] Contrary to appellant's claim, this hardly shows that White was "equivocal" about the government's desire for testimony against Hilton and what he could "get for it" (Supplemental Br. 17). The questions and answers set out in appellant's Supplemental Brief (p. 9) in support of this argument were—with the one exception of the question put by the Chief Judge—part of some half-dozen pages of transcript in which defense counsel tried in vain to properly frame his question. Finally, Chief Judge Mishler intervened to assist him (A. 186):

> "Q. Okay. In addition to that, do you feel what the prosecutors would say and what your sentences would be would be different if you said Fred Hilton didn't participate in the robbery? In other words, do you think——
>
> The Court: May I frame the question, Mr. Bloom?
>
> Mr. Bloom: Pardon?
>
> The Court: May I try to frame the question?
>
> Mr. Bloom: Please, please.
>
> The Court: Aside from the question as to whether it's the truth or not, forget that for a moment and lay it aside, don't you think that the prosecutor would be more helpful to you if you said Fred Hilton was the driver than if you said that he was not the driver?
>
> The Witness: Yes."

> "So Avon White has these 175 years plus two life sentences hanging over his head and as opposed to that he is now pleading guilty to one crime, one bank robbery, the 20-year count. They are going to dismiss the 25-year counts and the 25-year counts, and he has pleaded guilty to something in the Bronx known as a Class B, as in boy, felony, which does not carry a mandatory minimum sentence, so he can get probation or he can get time served or he can get concurrent time with whatever federal sentence. You heard him, he is going to get a federal sentence and it will be recommended that he get concurrent time, it is going to be recommended that he do it in a federal jail, this concurrent crime, and it is quite possible the federal judge can sentence him under what is known as the Youth Corrections Act which would carry a possible six-year sentence and involving no more than four years in jail."

All this, as defense counsel continued, if White says the word 'Fred Hilton'". Moreover, if White "doesn't cooperate, well, you understand, they are not going to dismiss these other three robberies, they can prosecute them because he has broken his part of the deal . . ." (A. 377).

Surely there was no doubt in the minds of the jury that there was a *quid pro quo* for Mr. White's testimony. Perhaps recognizing this, appellant has again resorted to a somewhat strained rending of the record based on the response of Mr. Truebner, the Assistant United States Attorney in the Southern District of New York, to Mr. White's letter. In his letter to Mr. White, Mr. Truebner wrote in part, "We are * * * actively trying to find a solution. In this connection, we have contacted both your attorney and the District Attorney's Office in the Bronx to see if other arrangements can be made. We certainly have not forgotten you and hope to be able to report some progress in the near future" (A. 506).

Although nothing was done for Mr. White in "the near future", and in fact it was determined that nothing could or should be done for him (A. 468) appellant has constructed the following strained argument (Br. 16-17):

> The government had argued at trial that on the basis of White's testimony the complete understanding between White and the government had been laid before the jury—namely the two guilty pleas to cover some, but not all, of the outstanding indictments against him, the promise to get him the time in federal pens, but no sentence promises. Thus, White was not getting that much consideration, and there was no special motive to lie and name Hilton. This state of affairs as presented to the jury was a lie according to the letter and the Truebner response to it. In addition to illustrating the real importance to White of the promise of federal time, the letter reveals an ongoing relationship of trade-off between White and the government, in which other promises were made, but hidden from the jury. Truebner's written response to White's letter made a promise to White which was not revealed at the trial. Truebner's letter clearly promises government action to get White out of Sing Sing sometime 'in the near future.'"

Appellant's argument continues:

> "It is interesting to note also that a third bank robbery indictment was added to those covered by his federal plea at about the same time as the letter. Thus, White got action with this letter, an expectation of transfer prior to sentence, leverage from the testimony he had to offer against Hilton."

First, assuming that Mr. Truebner's letter of February 18, 1974 constituted a promise of any significance, in light of the promises that had been made and disclosed, since

it was ultimately determined that nothing was to be done for Mr. White, it is debatable that there was any obligation to disclose it to defense counsel in July, 1974. Moreover, assuming the disclosure had been made, the jury would have then been made aware of the fact that despite the fact that White was still in administrative segregation in July, 1974—for his own protection, White was nevertheless prepared to testify. If anything, this would have tended to detract, rather than enhance the *quid pro quo* argument.

Second, it is not true that "about the same time as the [White] letter" a third bank robbery indictment was added to those covered by his federal plea. In fact in a letter dated March 28, 1974, White's attorney was advised that in return for his plea of guilty to one bank robbery (by the U.S. Attorney for the Southern District of New York) before Judge Gagliardi, Mr. White would not be prosecuted for *two other* robberies (A. 165). A letter from Mr. Clarey written in July, 1974, included immunity for White's participation in a third bank robbery ("the Cambria Heights case" [A. 165]). Mr. Clarey, at the trial, explained that this was "not an additional consideration" (A. 166):

> "The original understanding with Mr. White was, as I know it, he would plead to one bank robbery, period.
>
> Now, I questioned him concerning the bank robberies he was involved in to get it down pat in a letter. Any bank robbery that he admitted to was covered by the agreement. If it was omitted in the letter to the Southern District, I don't know why they never called me to ask me specifically about it except they checked to make sure we wouldn't prosecute for this bank robbery."

We believe, in sum, that the foregoing discussion has shown that the timely disclosure of the letter would not have made one bit of difference.

3. Appellant also argues that "[a] new trial is further mandated, because this is a case where the government's suppression of the evidence cannot be excused as inadvertent" (S. Br. 19). We do not believe, nor did the district court find that the letters were deliberately suppressed.[9] Indeed, under the circumstances, given all that Mr. Clarey did disclose, there was no reason to deliberately withhold this document. Rather, Mr. Clarey's failure to disclose the letter was a product of the unfortunately careless manner in which he handled the various Jencks Act and related materials. As appellant correctly observed (S. Br. p. 20) "the trial record indicates that he also forgot other letters, but remembered in the nick of time in the middle of counsel's cross-examination of White, where issues relating to other letters were raised."[10] We must concede, however, in all candor, that although Mr. Clarey may not have acted in bad faith, "we cannot characterize the government's failure to disclose these [letters] as entirely without fault". (*United States* v. *Pfingst*, 490 F.2d 262 (2d Cir.), *certiorari denied*, 417 U.S. 919 (1973)); for the letter was clearly the kind of material that should have been turned over to defense counsel prior to the cross-examination of White.

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[9] The district court, in fact, found to the contrary. In his memorandum of decision, which incorporated his "findings of fact" (A. 16), he accepted Mr. Clarey's testimony that he simply forgot about the letter.

[10] There were actually two such incidents at trial. One when Mr. Clarey remembered a letter which he had written to Mr. White detailing the terms of the plea bargain (323); and, two, when he remembered certain grand jury testimony of White (341). Appellant, however, is incorrect when he states that it was also "Clarey who 'forgot' to preserve the evidence of Professor Edgar's failed [photographic] identification on the day after the car theft" (Br. p. 20). The fact is, as we show, *infra*, p. 44, that it was an F.B.I. agent who failed to preserve the photographs, which were shown the day after the bank robbery and before the United States Attorney's Office was involved in the case.

*United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974). "Nevertheless, the mere existence of undisclosed evidence, even following a request, does not alone compel a new trial under *Brady*". *United States* v. *Pfingst*, *supra*, 490 F.2d at 277. As this Court held in *United States* v. *Keogh*, 391 F.2d 138, 147 (2d Cir. 1968):

> . . . *Brady* eliminated the issue of good faith when a suitable request has been made, the Court retained the requirement of materiality, as had earlier decisions of ours, see United States v. Consolidated Laundries Corp., 291 F.2d 563, 570-571 (2 Cir. 1961); Kyle v. United States, 297 F.2d 507, 513-515 (2 Cir. 1961), without, however, being obliged by the facts to define with precision just what this meant.

Moreover, as Chief Judge Kaufman explained in *United States* v. *Pfingst*, *supra*, 490 F.2d at 277, the "term materiality as used in *Brady* clearly describes evidence of greater value than which is 'favorable' to the accused'. *Giglio* v. *United States*, *supra*, 405 U.S. at 154, 92 S. Ct. 763". Chief Judge Kaufman further observed that (Id):

> The term "materiality" as used in *Brady* clearly describes evidence of greater value than that which is merely "favorable to the accused." Giglio v. United States, *supra*, 405 U.S. at 154, 92 S.Ct. 763. This distinction, moreover, comports with the rationale that where the prosecutor has at most been negligent in failing to comply with a request for discovery, prophylatic considerations must be tempered by an evaluation of the prejudice to the defendant from the nondisclosure. In striking this balance, where nondisclosure has been inadvertent rather than willful, we have formulated a standard of materiality which requires that there be "a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a con-

viction." United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969); United States v. Mayersohn, *supra*, 452 F.2d at 526, United States v. Kahn, *supra*, 472 F.2d at 287.

This standard was recently applied in *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), upon which the appellant also relies, where there was failure to disclose a letter from a witness to an Assistant United States Attorney who "must have been aware how useful to the defense [the witness'] letter would have been" (506 F.2d 1323). Accordingly, it was held that "[S]ince the government failed to provide significant Jencks Act materials, the test is whether 'there was a significant chance that this added item, developed by skilled counsel . . . , could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969). See *United States* v. *Houle*, 490 F.2d 167, 171 (2d Cir. 1973), *cert. denied*, — U.S. — (1974); *United States* v. *Fried*, 486 F.2d 201, 202-203 (2d Cir. 1973), *cert. denied* 416 U.S. 983 (1974)', (506 F.2d 1333)."

Applying that test in *Sperling*, the Court evaluated and balanced, among other things (1) "the enormous amount of other materials that was available and used to impeach [the witness]; (2) "the extensive cross-examination of him by defense counsel; and (3) "the substantial evidence that corroborated his testimony". (506 F.2d at 1339).[11] Here, a balancing of the considerations found controlling in *Sperling* supports the conclusion of the district court here that a new trial was not required; for as we have already demonstrated: (1) there was an "enormous amount of other materials that was available and used to impeach" White; he was extensively and effectively cross-examined, indeed

[11] Based on the evaluation of these factors, the convictions of some of the defendants were reversed; and others were affirmed.

his credibility was completely undermined; and moreover, on the conspiracy count, upon which he was convicted, there was substantial corroboration, for White's testimony. On that aspect of the case, the evidence was undisputed that, on the day prior to the robbery, appellant, along with Avon White, stole Professor Edgar's car, and that car was used as the getaway car for the bank robbery and abandoned the same day. This evidence—without White's testimony—would support an inference that the car was taken by appellant for the purpose for which it was used. Indeed, as Mr. Clarey persuasively argued to the jury in his summation (A. 399-400):

> "Now, what possible purpose, again laying aside for the moment Avon White's testimony, what possible purpose could Freddie Hilton have had in stealing that getaway car with another person, another heavier, taller person?
>
> Did he steal that car, the two of those people, did they steal this car at gunpoint to take a little joy ride?
>
> Did they take a six year old, four door Chevrolet to impress their friends?
>
> Did they risk an armed robbery and a kidnapping charge to get a car for their personal use?
>
> In order to commit a bank robbery they had to take a car at gunpoint because they had to have keys. [As] I pointed out in my opening statement, they couldn't rely on crossing wires of a car and take a chance that the car would stall during a bank robbery."

In sum here, as was the case with several of the *Sperling* defendants, there is no basis for ordering a new trial under the applicable legal standard. Moreover, even if this was a case involving deliberate non-disclosure of impeachment material—as in *Napue* v. *Illinois*, 360 U.S. 264 (1964)

—a new trial would not be required, because even then a new trial is necessary only if "the false testimony could *** in any reasonable likelihood have affected the judgement of the jury." No such showing has been made here. See, also, *United States* v. *Scijo*, — F.2d — (2d Cir. April, 1975), Slip op. 3039, 3053.

## B. The Conduct of the Hearing

Appellant argues, alternatively, that at "the very least *** the District Court's conduct of the April 10th *proceedings ex parte*, in face of the court's order for a *hearing*, demands a remand to a different District Court Judge for a full, fair and adversary examination of these issues" (S. Br. p. 22). We do not agree.

First, to the extent that the issue here turns on the significance of the letter, that is a question of law. Indeed, in *United States* v. *Sperling, supra*, this Court resolved the issue arising from the non-disclosure of a letter—the significance of which could have escaped the attention of the prosecutor—without a remand to the district court; and, as previously noted, based on its evaluation of the record, affirmed the conviction of some of the defendants, and reversed the conviction of others. While the remand here gives this Court the benefit of the findings of the district court judge who presided over the trial, *United States* v. *Sperling* demonstrates—as Chief Judge Mishler concluded—that any prejudice to the defendant as a consequence of Mr. Bloom's deliberate absence from the hearing could have been cured by the submission of a legal memorandum "indicating how he could have used the letter at the trial." Moreover, appellant failed to suggest what more he could have accomplished by his presence at the hearing.

Second, contrary to appellant's claims that Mr. Bloom "made a justifiable request for a delay of the hearing, since he was on trial awaiting a verdict on another case" (Supplemental Br. p. 22), the fact is that there was no reason

why he had to present at the State trial on April 10, 1975, to await a verdict. As Justice Greenfield pointed out in his letter to Chief Judge Mishler, the defendant in the State criminal case was represented by assigned counsel, and he regarded Mr. Bloom as "a volunteer". Moreover, there was no reason offered as to why Mr. Bloom's presence, along with assigned counsel for his "client" and counsel for the co-defendants, was necessary to take a verdict.

Appellant's claim (Supplemental Br. 23) that Mr. Bloom was personally "directed" by Justice Greenfield to be available during the jury deliberations on April 10, hardly squares with Justice Greenfield's description of Mr. Bloom as "a volunteer". Moreover, it is difficult to believe that Justice Greenfield would have insisted that both Mr. Bloom, and the court appointed counsel whom he was assisting, be present for the return of the verdict, had Mr. Bloom asked him permission to be excused. The fact is that Mr. Bloom could easily have been present on April 10, 1975, had he really wanted to; and Chief Judge Mishler, who had already been more than indulgent, and who had directed the presence of Mr. Clarey, Mr. Truebner and Mr. White on April 10, 1975, was not required to disrupt his calendar to suit Mr. Bloom's convenience. Under these circumstances, there is no need to remand for yet another hearing and further delay. Indeed, such a remand would constitute a mandate for such disruptive conduct in the future.

## POINT II

### The appellant was not deprived of a fair trial by rulings of the District Court or the conduct of the prosecutor.

Point I of appellant's main brief cites five alleged errors which occurred at the trial which he claims prejudiced his right to a fair trial. We believe that this argument is without merit because some of the claimed "errors" were not errors at all and were elicited or provoked by appellant, and because to the extent error was committed, it was cured by an appropriate instruction.

1. The first claim of error—which did not involve any error at all—was the alleged prejudicial testimony of Avon White about what was done with the proceeds of the robbery—in that "[i]t was put into a kitty . . . for food and rent and guns and stuff". This testimony was elicited, without objection (A. 228) on redirect after it was established on cross-examination that of the $5,800 that was taken from the bank, White received only $200 (A. 207). Since this seemed somewhat implausible, the Assistant United States Attorney sought to show exactly why he got such a relatively insignificant amount. As Chief Judge Mishler explained when—some twenty-six pages later in the middle of the testimony of another witness—defense counsel first raised the issue in the form of a motion for a mistrial (A. 412);

> "I think you asked it, Mr. Bloom, when you asked the witness how much he got and he said $200. Out of $5800, that made it appear that Mr. White was telling a tall story. I think the Government had a right to show how it was distributed."

Moreover, evidence showing the manner in which the proceeds of a robbery are distributed is clearly relevant and

admissible on the direct case even if it shows other criminal acts. *United States* v. *Carrella*, 411 F.2d 729, 731 (2d Cir.), *cert. denied*, 396 U.S. 860 (1969).[12]

2. The second claim of error—which was not error—occurred during the cross-examination of Detective Thompson (who arrested appellant) and during a line of questions which were concededly irrelevant (A. 369), and which were apparently intended to bait the witness (A. 271)

> Q. Okay. And to your recollection, there was no briefcase and the gun was not in a briefcase? A. Don't recall. I saw him with a gun in his hand, counsellor.
>
> Q. Did you shoot at him? A. I could have shot him, sir, but I didn't.
>
> Q. Because he wasn't facing your way; right? A. He had a gun, counsellor. He told me he would have shot me——
>
> THE COURT: No. Just answer the questions.
>
> A. (Continuing.) I didn't shoot him, sir.

Appellant's claim the district court should have instructed the jury "to disregard or strike out the officer's testimony", (Br. 36), ignores the fact that at trial counsel apparently thought the "error" was insignificant enough not even to ask for such relief. Under these circumstances, the point has not even preserved for review.

3. Appellant also claims he was prejudiced by the following colloquy during the direct examination of Detective Thompson, who arrested him on June 7, 1973 (A. 233):

> Q. Now, on June 7th, 1973, did you go somewhere early in the morning on that day? A. Yes, I did.

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[12] Although the district court invited counsel to submit reasonable limiting instructions (A. 256) none was forthcoming.

Q. Where did you go? A. I went to the 75th Precinct in Brooklyn.

Q. What happened generally at the 75th Precinct in Brooklyn? A. It was a combined effort of the Police Department and the F.B.I.——

Q. Was there a briefing that morning at approximately 6:30?

MR. BLOOM: Objection.

THE COURT: Yes or no?

A. Yes.[13]

Appellant alleges that this testimony "over objection", contributed to the picture being painted of him as a "dangerous most wanted criminal of murderous character" (Br. p. 34). Since defense counsel pleaded with Chief Judge Mishler to let him show that the reason appellant was carrying a gun at the time of arrest was because he knew he was regarded by the police as just such a person (174), and he needed the gun because he believed he would be shot on sight, one wonders at the sincerity of this claim.[14] In any event, no objection was taken to the question and answer regarding the joint F.B.I. and police effort and, although Chief Judge Mishler offered to give a curative instruction if one were submitted, the only instruction sought by defense counsel was one which would have compounded the alleged error; he actually wanted Chief Judge Mishler to charge that appellant was a member of the Black Liberation Army, a notorious group of murderers and bank robbers (A. 254).

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[13] This colloquy was intended to preface an offer of proof which was ultimately rejected by the district court; no further questions were put by the Assistant United States Attorney on this aspect of this appellant's arrest.

[14] Contrary to the appellant's suggestion, the admission of the gun which White testified was similar to that carried by the appellant during the robbery of the getaway car was proper (A. 248). *United States* v. *Ravitch*, 421 F.2d 1196 (2d Cir. 1970).

Moreover, at least part of whatever prejudice appellant suffered was mitigated by the testimony elicited on redirect that not all of the officers who arrived at the scene were working with Detective Thompson, but were there for a different purpose (A. 277). Under these circumstances this alleged error—which could have been cured by an appropriate instruction had counsel so desired—hardly warrants reversal.

4. The remaining two errors—statements or parts of them—which were made in summation were cured by an appropriate instruction. Thus, after Mr. Clarey overstated the argument regarding the reason why appellant was carrying a gun ("consider what type of a person carried around a thing like this indicating"), Chief Judge Mishler instructed the jury as follows (A. 403):

> "You know, Mr. Clarey—disregard it, I think the statement is inappropriate, that is not in issue, the type of person before you. The only question before you is whether the Government has proved beyond a reasonable doubt that this defendant committed the bank robbery or aided and abetted in the bank robbery, and the only reason that evidence was permitted before was to corroborate, if you believe, the testimony of Avon White.
>
> MR. CLAREY: I'm sorry, your Honor, I misunderstood earlier ruling."

Similarly when the prosecutor stated that the deal with Avon White was for his truthful testimony, and then began to state that it "is the only possible deal we could ever get into—", Chief Judge Mishler immediately interrupted him, and told the jury (A. 413):

> "THE COURT: You just strike that, there is no testimony in the record on that. That is just Mr. Clarey's personal opinion and has no place in this record. He can only comment on the testimony which you have heard."

While we concede that neither of these statements were appropriate, the instructions given by Chief Judge Mishler were sufficient to eliminate any prejudice to appellant. *Frazier* v. *Cupp*, 394 U.S. 731, 735 (1969); *Spencer* v. *Texas*, 385 U.S. 554, 565 (1966).

## POINT III

### The appellant was not deprived of his opportunity to present a defense and cross-examine witnesses.

Appellant's argument, that he was deprived of his opportunity to present a defense and cross-examine witnesses, is without merit. This argument involves two basically separate issues: (1) the ruling of the district court—similar to that which was sustained in *United States* v. *Brown*, 511 F.2d 920 (2d Cir. 1975)—that appellant's membership in the Black Liberation Army was not to be disclosed to the jury; and (2) the alleged failure to preserve certain "exculpatory evidence damaging to the credibility of a witness". We believe that these arguments are without merit.

### A. The Defendant's Membership in the Black Liberation Army.

1. Prior to trial the district court stated that it would not permit the appellant to show that he was a member of the Black Liberation Army. In so ruling, Chief Judge Mishler stated (A. 39):

> "I see no relationship between any claim of membership or attributing any membership to the defendant to the Black Liberation Army. I can see nothing but prejudice against the defense by advising the jury that he's a member of the Black

> Liberation Army. You might find some sympathy amongst some. The possibility that Mr. White, from what I've heard of was motivated because he felt the defendant was wanted by the Police because of his membership with the Black Liberation Army is remotely speculative, and I think it's designed only to turn this trial into a political trial and I would direct the defendant not to mention any possible membership in the Black Liberation Army or his political beliefs or militancy".[15]

This ruling was plainly correct; indeed, the issue appears to have already been resolved in *United States* v. *Brown*, *supra*, which is ignored altogether by the appellant. There, in rejecting an almost identical claim, Judge Medina wrote that the defendant's membership in the Black Liberation Army "had at best extremely slight relevancy to the bank robbery charges being tried" (511 F.2d at 920):

> Whether so intended or not, it is clear to us that the connection with the Black Liberation Army, if any, of Brown or the prosecution witness Roland was so tenuous as to give little support to the theory that extensive questioning of the jurors on the *voir dire* and prolonged cross-examination of Roland on the subject of the Black Liberation Army would disclose some bias by the police or by other enforcement agents against the Black Liberation Army that would rub off on Brown and prejudice him. What such inquiries might well have done, on the other

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[15] Chief Judge Mishler added, however, that "if the defendant at any time wants to inquire as to Mr. White, I'll permit an inquiry so that the record can be made as to what went on between himself and the F.B.I. or the Police Department concerning the subject matter under discussion, but that only to give the defendant a chance to make a record." Although Chief Judge Mishler repeated that offer later on (A. 426-427), appellant never took advantage of it.

> hand, was to give prospective witnesses the notion that it would be better for their health if they did not testify against Brown, and to give jurors the notion that a verdict of guilty might have unfortunate consequences.

Accordingly, Judge Medina found (*Id.*):

> In the exercise of his discretion Chief Judge Mishler properly refused to permit any discussion of or any question concerning or even any mention of the Black Liberation Army in the presence of the jury. Under the circumstances this was precisely the correct ruling to make on the subject.
>
> By way of contrast, however, Chief Judge Mishler permitted an exhaustive cross-examination of Roland to bring out that his testimony against Brown was given under a promise of immunity and to prove a life of crime and violence quite sufficient to impeach him, had the jury not been furnished with what appears to us to be ample corroboration of Roland's testimony. Brown did not testify and he rested his defense at the close of the prosecution's case.

This holding is controlling here. And, appellant's tortured arguments to the contrary, there is even more reason here than in *Brown* for sustaining Chief Judge Mishler's ruling.

First, while Chief Judge Mishler permitted the same exhaustive cross-examination of White that was permitted of the witness in *Brown*, here White specifically admitted that he thought "the prosecutor would be more helpful to [him] if [he] said Fred Hilton was the driver than if [he] said he was not the driver" (A. 186).

Second, despite the fact that appellant was twice offered the opportunity to make a record, by examining White

outside the presence of the jury (A. 39, 426-427), to show that he knew about appellant's association with the Black Liberation Army and the part that such knowledge played in motivating him to testify, no such record was ever made. Accordingly, his argument at this point is based on sheer speculation.

Third, in evaluating any alleged prejudice to him as a result of the exclusion of evidence regarding the Black Liberation Army, the substantial prejudice, which might have been created in the minds of the jury had his membership been revealed must also be considered; the fact of his membership in a notorious group of bank robbers and police killers could hardly have helped his cause.

Under these circumstances, given the already devastating cross-examination and the effect that it had on the jury, Chief Judge Mishler's ruling can hardly be said to constitute error at all, much less reversible error.

2. The second aspect of appellant's agrument in this regard is equally without merit. During Avon White's testimony, he identified a 9 millimeter Browning gun, with the serial number scratched off, as the weapon carried by appellant during the theft of the getaway car; this weapon was taken from the appellant after his arrest. When Chief Judge Mishler initially indicated that he would permit the gun to be offered in evidence, defense counsel indicated that he was renewing his motion regarding appellant's Black Liberation Army membership. In so doing, he stated (174):

> I've given you all the arguments on that. I repeat those and I ask your Honor, in view of your immediate ruling now, with regard to Mr. Hilton carrying the gun, that he was by what he was able to read in the newspapers, early 1973, that he was a member of the Black Liberation Army, dangerous. He had every reason to believe that law enforcement people

were going to shoot him on sight and it was for that reason that he was carrying any gun.

I again urge your Honor to permit me to elicit testimony from Mr. White and others as to Mr. Hilton's point of view about treatment of black people in this country and his own actions and thoughts in that regard.

THE COURT: I am now more convinced than ever that it's nothing but an attempt to turn a charge of bank robbery into a political discussion.

The motion is denied.

Chief Judge Mishler's ruling was clearly correct.

It was irrelevant why appeliant was carrying the gun when he was arrested; the critical fact was that the weapon was similar to the one which White said was used in the criminal yenture (App. 249). *United States* v. *Ravitch*, *supra*. Moreover, the only competent evidence as to appellant's belief that "law enforcement officials were going to shoot him on sight" could only come from him, and not "Avon White and others". Finally, the disingenuous nature of the "offer of proof" may be found in defense counsel's plea "to elicit testimony from Mr. White and others as to Mr. Hilton's point of view about the treatment of black people in this country and his own actions and thoughts in that regard". Mr. Hilton's "point of view" on this issue was hardly relevant to any issue before the jury. Indeed, this offer of proof belies appellant's claim that Chief Judge Mishler "had no basis in fact in the record" (Br. 41) for concluding that the defense counsel was attempting to "turn a charge of bank robbery into a political trial."

3. The final aspect of appellant's Black Liberation Army argument appears to turn on the alleged failure by Chief Judge Mishler to give a "corrective charge" at one point during the trial. The basis for this claim arose out

of the testimony of the Detective, Otis Thompson, who arrested appellant on June 7, 1973. At the outset of his testimony, the following colloquy took place (A. 233):

> Q. Now, on June 7th, 1973, did you go somewhere early in the morning on that day? A. Yes, I did.
>
> Q. Where did you go? A. I went to the 75th Precinct in Brooklyn.
>
> Q. What happened generally at the 75th Precinct in Brooklyn? A. It was a combined effort of the Police Department and the FBI——

Although no objection was voiced at the time, near the end of the direct testimony, defense counsel moved for a mistrial on the following ground (A. 253):

> [T]he aborted attempt to lay out that this was some kind of large scale effort, combined effort of the FBI and Major—New York City Police Department Major Case Investigative Unit, cannot but create the impression that Mr. Hilton was a very much wanted man, a very dangerous man, which, although the law enforcement people may believe that to be true had no place in this or any other trial.

Since appellant apparently wanted to elicit testimony of this kind to show why he was carrying a gun, it is difficult to understand the reason for the application for the mistrial. In any event, Chief Judge Mishler stated that he believed that a corrective charge would be sufficient; and he invited defense counsel to suggest one. The suggested ~~charge offered by defense counsel to suggest one. The sug-~~ged charge offered by defense counsel was the following (A. 254):

> "The first charge, the charge that comes to mind, the nature of the charge has to do with what is the reality here. The reality here is Fred Hilton was thought to be a member of the Black Liberation Army."

The suggestion that it was reversible error to reject this charge as completely out of hand (Br. 38) does not require a response.[16]

## B. The Alleged Failure to Preserve the Exculpatory Evidence.

On the day of the bank robbery, April 10, 1973, after the getaway car was found, Professor Edgar—its owner—was questioned by Special Agent William Baker of the F.B.I. Since there were no specific suspects, Edgar was shown photographs of known bank robbers in the New York area, and photographs of known militants with the Black Liberation Army, but was unable to make any identification (A. 494). Apparently, because the photographs were shown before there was any suspect,[17] Special Agent Baker did not retain them and they were not available at trial. Appellant's contention, in effect, that this required exclusion of Professor Edgar's testimony is without merit.

Whatever the wisdom of the procedure of not retaining the photographs shown before law enforcement officials have any suspect in mind, it seems clear that the failure to keep them (where no identification is made) does not rise to the level of a violation of the Constitution (see, *United States* v. *Augenblick*, 393 U.S. 348, ~~352-352~~ 356), and would not require the exclusion of Professor Edgar's in court identification. See *United States* v. *Sewar*, 468 F.2d 236 (9th Cir. 1973), *cert. denied*, 410 U.S. 916 (1974); *United States* v. *Angello*, 451 F.2d 1167 (2d Cir. 1971).[18] Indeed,

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[16] Appellant's complaint that Chief Judge Mishler never ordered the disputed testimony stricken (Br. 38), ignores the fact that he never asked for that relief.

[17] It was not until September, 1973, that Avon White implicated appellant (A. 155, 203-206).

[18] In *United States* v. *Sewar*, *supra*, a technician who inadvertently destroyed defendant's blood sampel was allowed to testify that the sample showed that defendant was intoxicated. The

[Footnote continued on following page]

in this case, defense counsel was offered an opportunity to avoid any prejudice to his cross-examination of Professor Edgar. Thus, Chief Judge Mishler suggested that the United States stipulate that appellant's photograph was in the array shown to Professor Edgar on April 10, 1974 (A. 355). Such a stipulation had been entered into earlier in the trial with respect to an unavailable array which had been shown to another witness (A. 298).[19] Before Chief Judge Mishler could finish the sentence, defense counsel interrupted, "It is too late now. If it had been done before my view as to certain questions would have been different" (A. 356).

This argument, which is repeated here (Br. 50), is utterly without substance, and, indeed, neither in the district court, nor here, does appellant specify which "questions would have been different" or why it was too late.

The direct examination of Professor Edgar certainly would not have been affected one way or another.[20] Moreover, at the time Chief Judge Mishler made the suggestion, the defendant had put the following questions (A. 352-353):

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Court of Appeals held that "the fact that the sample is missing may make cross-examination more difficult, but that does not amount to a denial of confrontation" (468 F.2d at 238). Similarly, in *United States* v. *Augello, supra,* police agents who heard conversations, the tapes of which were later destroyed, were allowed to testify to the substance of these conversations.

[19] In that instance it was defense counsel who made the suggestion (A. 297), and Mr. Clarey responded he would so stipulate because he was reasonably certain that Hilton's photograph would have been included (A. 298). This, of course, is equally true with respect to the array shown Professor Edgar.

[20] It is true that defense counsel did not object to the admission of the prior out-of-court identifications made by Professor Edgar (A. 350), but such an objection would have been overruled; for such evidence is plainly admissible. See, e.g., *United States* v. *Ash,* 461 F.2d 92, 101 (C.A.D.C. 1972), *reversed on other grounds,* 413 U.S. 300 (1973).

Q. Good afternoon. These two men who approached you in the parking lot in Queens College, did either of them have weapons or guns?

Yes.

Q. How many of the men had guns?

A. To my knowledge, one.

Q. Was it that gentleman seated over at the table there or was it the other man?

A. It was the other man.

Q. To your knowledge, did you ever see a gun of any description in the possession of Mr. Hilton, sitting over there?

A. No.

MR. BLOOM: Thank you. I have no further questions.

It certainly was not too late for counsel to take advantage fo a stipulation that Professor Edgar was unable to pick appellant's picture out of a spread on the day after his car was taken. Indeed, the strategic decision appellant made, was to forego a form of impeachment which is rarely successful (see Wall, *Eyewitness Identification In Criminal Cases*, pp. 19-23), in return for a point on appeal. Such strategic decisons are not the knd whch should be countenanced here.[21]

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[21] In a footnote (Br. 40, n), appellant cites other alleged instances (mainly involving Avon White) in which his cross-examination also was "unfairly limited". We believe that each of these claims are without merit for reasons which appear obvious in the context of the trial, and will not burden a brief already too long with any response other that to rely on our argument in Point I that, in light of the manner White's testimony was impeached, any error was harmless. Moreover, appellant is simply wrong where he says that the jury did not learn that White had been diagnosed as having "psychosis with psychopathic personality and reactive features." That diagnosis was in fact told to the jury when evidence was introduced that White had been cured of it (A. 383).

## POINT IV

### The District Court committed no error in charging the jury on conspiracy.

Appellant is mistaken in his contention that reversible error was committed when the district court failed to charge the jury that the federally insured character of the bank robbed was an element necessary to prove in support of the conspiracy charge. Appellant never requested that such a charge be made, nor did he make timely objection at the completion of the district court's instructions. He is therefore precluded from raising the issue here (F.R. Crim. P. Rule 30). Moreover, since the requirement that the bank be federally insured is merely jurisdictional, and does not go to whether or not appellant actually conspired to rob the bank, and since the evidence was undisputed that the bank was insured,[21a] the failure to so charge is hardly "plain error."

## POINT V

### Appellant's contentions respecting the deliberations of the jury and its verdict are without merit.

Appellant contends that the verdict was inconsistent and that the usual rule which upholds seemingly inconsistent jury verdicts should be bypassed because one of the jurors became irrational during the deliberations. In our view, the verdicts were not inconsistent and there is no basis in the record to conclude that the verdict of guilt should now be impugned because one juror was, for a short

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[21a] The evidence on this issue included the certificate of insurance issued by the FDIC and a check testified to have been for the premiums of 1973. This evidence is more than sufficient. *United States* v. *Ballard*, 418 F.2d 325, 327 (9th Cir. 1969); *Callahan* v. *United States*, 367 F.2d 563 564 (9th Cir. 1969).

time, suffering distress in the cramped quarters of the jury room.

For the Court's convenience, we set out the progress of the jury deliberations. The notes which were sent out by the jury (Court Exhibits 3, 5-11) have been reproduced, beginning at A. 495-502 of the Appendix for Appellant.

The jury began to deliberate at 10:55 A.M. on July 18, 1974 (702). A lunch break was taken at 12:30 P.M. and lasted until 2:00. The afternoon's deliberation was uneventful. The court called the jury back to the courtroom at 5:50 P.M. and asked the foremen to send a note to the court stating how long the jury wished to deliberate (705). At 6:07 P.M. the foreman returned a note requesting that Judge Mishler reread the three counts which had been submitted (705; A. 495). Further, the note stated that if the jury could not come to an agreement by 7:00 P.M. they would continue their deliberations the next morning. At 7:15 P.M. the Court received a note stating that the jury was unable to reach an agreement and wished to continue deliberations the next day (710; A. 496).

The following morning at 9:15 A.M., the jury continued its deliberations in the jury room (716). At 10:45 A.M. Chief Judge Mishler read into the record the following note from foreman (716-717; A. 497):

> To the Honorable Judge Mishler.
>
> We have a very emotionally disturbed male juror who has reached a point of physical distress, which in my opinion would require medical attention.*?*
>
> This condition is almost making it impossible to continue with our deliberation.
>
> It is also my opinion that if you were to speak to the jurors as to the clarification & definitions of the charges, it may help clear up negative views

and refusals to deliberate. This may also help the emotinal [sic] juror.

Thank you.

Daniel R. Romagnolo
Forman [sic] of the Jury

In an effort to determine the nature of the problem, the court summoned the jury (717). The jury entered at 10:50 A.M. and the court inquired "whether the deliberations are proceeding in a manner designed to reach a verdict based on the evidence?" Although the court suggested that a response to that question be sent in a note, the foreman volunteered that he was "not able to say whether it is really a mediecal or requires a physician. . . ." There was, as he described, "a little tension" in the jury room (719) and the other members of the jury were concerned over the physical well-being of the juror involved. The foreman expressly rejected the suggestion that, perhaps, his feelings concerning the disturbed juror's "logic" were coloring his opinion of that juror's well-being. It was then agreed that the matter might be resolved if the juror involved sent a note to the court (720).[22]

After the jury was excused, and during a discussion between the court and counsel on the second part of the jury's letter, the court clerk suggested that the jury might be moved from the jury room to a courtroom. He thought that this would relieve "the oppressiveness of the room, that . . . is creating tensions" (722), which the foreman had already commented existed and was hindering deliberations (719-720). Thereafter the jury was seated and the court conveyed the court clerk's suggestion to which the foreman responded, "that may help some of the closeness . . ." (724)

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[22] Judge Mishler thought it best not to give the jury the additional charges requested in the last paragraph of the note.

The jury then continued its deliberations in a new courtroom at 11:20 A.M. (129).[23]

At 11:45, the jury, in a note (A. 498), asked if appellant had to have been in the car on April 10th to be guilty of the substantive offenses. They also inquired as to the overt acts in the conspiracy count. Finally, they also mentioned that their new "environmental surroundings has helped . . . a great deal." (731; A. 498) Thereafter, when the jury was brought into the court, the foreman advised Judge Mishler that the new atmosphere was "excellent" (742). In answer to the questions in the note, the district court instructed the jury that appellant did not have to be in the car on the 10th so long as he stole the car with the knowledge and intent to use it for the bank robbery. As to the two overt acts, the court told the jury that one of them had to be shown, but not both. (742-744). The jury then returned to its deliberations (745).

At 2:20 P.M., the jury returned a verdict of guilty on Count 4, the conspiracy count 753). The jury, as it stated in its note which preceded the verdict, "covered every aspect of the case presented against Mr. F. Hilton, but could not reach a unanimous verdict on counts one and two" (752; A. 499). No mention, whatever, was made in the note of any impediment created by the juror who previously had been upset in the jury room. Moreover, when polled, juror number four—the temporarily upset juror—answered without hesitation that he agreed with the verdict of guilty (754). The court then requested the jury to continue its deliberations even though they believed they were deadlocked on the substantive counts (755). Defense counsel's application for a mistrial was denied (763). Thereafter at

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[23] Before they retired to deliberate in the courtroom across the hall from Judge Mishler's court, the jury was fully instructed on the elements of each crime (725-729).

5:10 P.M. the jury requested more time to deliberate (766; A. 500). Finally, the jury returned a verdict of not guilty on the substantive counts at 5:40 P.M. (766-767; A. 501). As with the guilty verdict, juror number four answered in a straight-forward manner when polled by the court (768).

Following the verdict, the court ascertained that the problems the jury experienced during their deliberations were indeed temporary. The court inquired: "Was this a passing transient thing or something that continued during deliberations?" (769 The foreman responded that "changing the environment . . . changed the whole, . . . not alone for the distress of the one individual but it was of great assistance in helping each member of the jury" (770).

The court also ascertained, through an examination of juror number four, that the tension and stomach pains that he had experienced were relieved by the change in environment (776-778). The court specifically inquired whether that problem interfered with his calm discussion of the evidence and choice of verdict (778). The juror answered that he knew exactly what he was doing; that he "didn't have a nervous breakdown" and that "the verdict had nothing to do with it, the verdict was done honestly" (778-779).[24] Counsel for appellant asked no questions of the juror, even though invited by the court (779).

Following the inquiry of the juror, Chief Judge Mishler found:

> I am satisfied that as all of you take your obligation seriously, juror number four just takes it a little more seriously, he is a little more tense and intense, and I think that you gave this case thorough

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[24] It will be recalled that when the Court received the note concerning the juror's distress, Judge Mishler requested the juror to set down on paper his situation. That was done; the note, however, was not delivered until after the full verdict (770; A. 502).

> consideration, you turned the case inside out and I am satisfied that you arrived at a verdict based on the evidence, and that you are satisfied with (779-780).

He then discharged the jury.

(2)

From the foregoing, it can be seen that appellant's description of the jury proceedings (Br. 52-54) bears no substantial relation to what in fact occurred. Concededly, one juror suffered severe distress at one point during the deliberations. That distress, however, was momentary and did not, as the juror stated, interfere with his verdict in the case. Further, the change from the jury room to the courtroom as the site for deliberations, which so dramatically changed the attitude of that juror, came about more than three hours before the guilty verdict was reached on Count 4.[25] When polled, the juror affirmed his verdict as did the other jurors. Moreover, when questioned, the foreman of the jury confirmed that the change of the room "was of great assistance" (770), as, of course, did juror number four (776): ". . . it was really when I went into the courtroom, I was more relaxed. . . . " Finally, Chief Judge Mishler, after having examined the juror, and after defense counsel was given the opportunity to inquire but declined, concluded that there was no basis upon which to find a tainted jury deliberation.

Most recently, in the case of *United States* v. *Dozier*, — F.2d — (Slip op. 4001; decided June 10, 1975), this Court was faced with a claim strikingly similar to appellant's. In *Dozier*, one juror suddenly, during the deliberations, re-

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[25] There is no basis in the record to support appellant's assertion (Br. 52) that the juror was distressed for "two thirds" of the deliberations.

fused to participate and the following note was sent to the court (Slip op. 4005-4006):

> "One juror feels there is no way for any person to make a decision regarding any person's guilt. This decision is reserved to God. The juror will *not* discuss the case, the facts, or anything about it. Maybe you can re-direct what we *must* do. That we cannot avoid a decision. It is not a matter of trying to convince anyone, but a matter of no discussion." (Emphasis in original.)

Thereafter, in what was a functional equivalent of the change of room in this case, the trial judge instructed the jury, and particularly the juror who refused to deliberate, of a juror's duty "to vote one way or the other." Shortly thereafter, the jury returned a verdict of guilty. In rejecting the defendant's claim that the verdict was not the product of a competent jury this Court stated (Slip op. at 4006):

> We disagree. While the note indisputably indicated that at the time it was sent the juror in question was reluctant to discharge a juror's duty to vote, it does not necessarily follow that the juror was inattentive at trial or failed to observe or absorb what was said during deliberations. However, we need not speculate as to the juror's processes since it is clear that he or she took the judge's instructions to heart by reaching a decision. Indeed all twelve jurors so indicated in open court when the jury was polled. In the circumstances, therefore, the incident is not "clear evidence of a juror's incompetence to deliberate at the time of his service" which justifies setting aside the verdict. *United States* v. *Dioguardi,* 492 F.2d 70, 78 (2d Cir. 1974).

See also, *United States* v. *D'Amato,* 493 F.2d 359, 363 (2d Cir.), *cert. denied,* 419 U.S. 826 (1974) where, as in the case at bar, the trial court had also determined, after inquiry, that the severe claustrophobia which eventually led to the

discharge of the juror, had not, up to then "'adversely affected the challenged juror's ability to decide . . . intelligently' [citation omitted] with respect to verdicts already returned."

On the facts of this case we can see, therefore, no reason to upset this very carefully deliberated verdict by any reason remotely connected with the isolated distress of juror number four. Appellant, however, seeks to rekindle the issue by suggesting that the jury's verdicts were inconsistent. That inconsistency, he claims in a roundabout fashion, was both a product of juror number four's incompetency and proof that juror number four was incompetent. We believe that these matters are completely separable and cannot be properly treated, as appellant suggests, as mutually supportive. There is, simply, nothing in the record to connect them save appellant's dogmatic assertions that juror number four was incompetent and that the verdicts were inconsistent.

We have shown that the verdict by juror number four was not the product of incompetence. Moreover, we have previously (*supra*, at 10-11) suggested an entirely appropriate explanation for the verdicts. We add only that it is highly unlikely that appellant was prejudiced by the momentary distress of juror number four [26] and that, even if the verdict might be viewed as inconsistent, there is no basis, under the cases, see *Dunn* v. *United States*, 284 U.S. 390 (1932);

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[26] We say this because we cannot fathom any claim concerning this juror which does not proceed on the premise that he was holding out for acquittal. It is simply preposterous to speculate the converse; that the remaining eleven jurors wished to acquit but convicted appellant out of a desire to go home, particularly when they stayed to deliberate three more hours on the substantive counts on which they acquitted appellant.

*Steckler* v. *United States*, 7 F.2d 59 (2d Cir. 1925), to reverse this conviction.[27]

Finally, we see no need for a lengthy response to appellant's "preserved" objection to the jury selection process (Br. 55) where, as appellant himself notes (Br. 3), the jury which was chosen was more than fairly representative of his age and race. His claim regarding the exercise of peremptory challenges by the prosecutor is without merit (*Swain* v. *Alabama*, 380 U.S. 202 (1965), and whatever disparity may have existed in either the panel or the array, provides no basis for relief. See *United States* v. *Fernandez*, 480 F.2d 726, 733 (2d Cir. 1973).

## POINT VI

### The sentence provided by the District Court was considered and, in line with well settled authority, should not be reviewed by this court.

Appellant presents two claims: (1) that he should have been granted the benefit of sentencing under the Youth Corrections Act; and (2) this Court should review the probation report and remand for sentencing because the district court abused its discretion, presumably, for not sentencing under the Act or because the district failed to meet the procedural requirements by not making a proper finding of "no benefit."

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[27] Appellant's quotation from *United States* v. *Zane*, 495 F.2d 683, 691 (2d Cir. 1974) (Br. 53) is completely inapposite. *Zane* notes, first of all, this court's "steadfast adherence" to the rule of *Dunn* and *Steckler* and then, goes on to reject the assertion of the appellant in that case, that a jury's verdict *acquitting* a defendant of conspiracy, bars a later verdict in the same trial convicting a defendant of a substantive crime encompassed by the conspiracy. We hardly perceive that appellant, who was *convicted* of the conspiracy, is in a stronger position than the *Zane* appellants.

*Dorszynski* v. *United States*, 418 U.S. 424 (1974) which is controlling requires rejection of these claims. Appellant is not entitled to appellate review of his sentence unless the trial court failed to follow the Youth Corrections Act.

> "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." *Dorszynski, supra*, 418 U.S. at 440-441, quoting from *Gurera* v. *United States*, 40 F. 2d 338, 340-341 (8th Cir. 1930).

The district court judge here obviously acted within the statute because he did make a sufficient finding of "no benefit." At the sentence, after hearing defense counsel's argument why the court must sentence the defendant under the Youth Corrections Act, Judge Mishler said, "I have considered and rejected any sentence under the Youth Corrections Act." Thus, the court ruling of "no benefit" met the requirements set out in *Dorszynski, supra* at 444:

> Literal compliance with the Act can be satisfied by *any expression* that makes clear the sentencing Judge *considered* the alternative of sentencing under the Act and decided that the youth offender would not derive benefit from treatment under the Act (emphasis added).

## CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

Dated: June 13, 1975.

DAVID G. TRAGER,
*United States Attorney,*
*Eastern District of New York.*

EDWARD R. KORMAN,
*Chief Assistant United States Attorney,*

PAUL B. BERGMAN,
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[28] We wish to acknowledge the assistance of Marc D. Teitelbaum, a third year law student at New York University Law School, in the preparation of this brief. Burton S. Weston, also a third year law student at New York University Law School, provided additional assistance in the preparation of this brief.

# AFFIDAVIT OF MAILING

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EASTERN DISTRICT OF NEW YORK

EDWARD R. KORMAN

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Brief for Appellee

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Edward R

EDWARD R. KORM

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16th day of June 19 75

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No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

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